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Sobering News for the Alcohol Industry

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by AMANDA GROVE*

Introduction

Last October, as part of the Anti-Drug Abuse Act of 1988,[1] Congress passed the Alcoholic Beverage Labeling Act of 1988, requiring manufacturers of alcoholic beverages to place warning labels on all product containers.[2] On November 18, 1988, President Reagan signed the bill into law.[3] Consequently, this November, for the first time in history, alcoholic beverage containers will bear a government warning label.[4] The purpose of this Note is threefold: first, to review the history of alcohol warning label legislation and to discuss several factors that prompted passage of the Act; second, to critically examine the Act, highlighting omissions and proposing improvements; third, to analyze sources of continuing pressure on the alcohol industry and the increasing momentum toward further regulation.

I
History of Alcohol Warning Label Legislation

A. Federal Legislative Action

Alcohol warning label legislation had been introduced and defeated in Congress for twenty-one years. The leading spokesperson for the warning labels, Senator Strom Thurmond (R-S.C.), began introducing such legislation in 1967.[5]

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1. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988) (to be codified at 21 U.S.C. § 1501 *et seq.*) [hereinafter Anti-Drug Abuse Act].

2. Alcoholic Beverage Labeling Act of 1988, Pub. L. No. 100-690, 102 Stat. 4518 (1988) (to be codified at 27 U.S.C. § 201 *et seq.*) [hereinafter Alcohol Beverage Labeling Act].

3. 24 *Weekly Comp. Pres. Doc.* 1553 (Nov. 21, 1988). *See also* McClintock, *Alcohol Warning Labels Set*, Wash. Times, Nov. 28, 1988, at B8, col. 1.

4. *See* Gunby, *Warning Label Required for Alcohol Containers*, 260 J.A.M.A., 3109, Dec. 2, 1988.

5. *Causes & Consequences of Alcohol Abuse: Hearings on S. 2047 Before the Sen-*

The attempts, until now, failed as a result of tremendous opposition exerted by the $70 billion-a-year alcohol industry[6] and its powerful lobby, which together contribute millions of dollars to political campaigns annually.[7] As a result of this lobbying, all attempts at legislation died on the vine.

Legislative action increased with the 1973 diagnosis of Fetal Alcohol Syndrome (FAS),[8] a birth defect affecting approximately 7,000 infants per year in the United States, caused by alcohol consumption during pregnancy.[9]

While diagnosis of FAS ultimately heralded a change in the course of alcohol warning legislation, initial legislative efforts toward establishing a warning label requirement were unsuccessful. In 1979, Senator Thurmond introduced an amendment mandating a warning label requirement to a bill under consideration in the United States Senate.[10] The bill eventually passed without the amendment.[11]

In 1986, a coalition headed by Senator Hawkins introduced another bill which was referred to the Senate Labor and Human Resources Committee. The Alcohol, Drug Abuse, and Mental Health Amendments of 1986[12] required a rotation system of five warning labels on all alcoholic beverages.[13] The

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ate Comm. on Governmental Affairs, 100th Cong., 2d Sess. 289 (1988) (statement of Patricia Taylor, Center for Science in the Public Interest) [hereinafter *Alcohol Abuse Hearings*].

6. 134 CONG. REC. S8821 (daily ed. June 29, 1988) (statement of Sen. Harkin) (citing Olin, *On The Hill: This Dud's For You*, NEW REPUBLIC, July 11, 1988, at 12.)

7. In 1985-86, twenty alcohol-related lobbies spent a total of $1.2 million on campaigns in the House and Senate. Novak, *Under the Influence*, 14 COMMON CAUSE MAG. 21 (May/June, 1988).

8. Characteristics of FAS include: growth deficiencies in length and weight; deficient brain development; facial abnormalities; heart defects; minor joint and limb abnormalities; delayed development; and mental deficiencies ranging from mild to severe. Streissguth, Herman & Smith, *Intelligence, Behavior and Dysmorphogenesis in the Fetal Alcohol Syndrome: A Report on 20 Patients*, 92 J. PEDIATRICS 363 (1978); Streissguth, *Fetal Alcohol Syndrome: An Epidemiologic Perspective*, 107 AM. J. EPIDEMIOLOGY 467 (1978).

9. Abel & Sokol, *Incidence of Fetal Alcohol Syndrome and Economic Impact of FAS-Related Anomalies*, 19 DRUG AND ALCOHOL DEPENDENCE 51, 56 (Jan. 1987).

10. 125 CONG. REC. 9980 (1979). The warning was to read: "Caution: Consumption of alcoholic beverages may be hazardous to your health, may be habit forming, and may cause serious birth defects when consumed during pregnancy." *Id.*

11. S. 440, 96th Cong., 1st Sess. (1979).

12. S. 2595, 99th Cong., 2d Sess., 132 CONG. REC. 8360 (1986).

13. *Id.* at § 531(a). The proposed warning labels cautioned against alcohol consumption during pregnancy, while driving, and with other drugs. In addition, they explained alcohol's link with disease and the risks of rapid and excessive use. *Id.*

Committee unanimously approved the bill,[14] believing that rotating labels were a viable way of launching a national public education campaign.[15] Despite the Committee's recommendation, however, the bill died on the calendar due to inaction.[16]

B. Federal Authority for Health Warning Labels

Federal authority to regulate the alcohol industry derives from the Federal Alcohol Administration Act.[17] This Act vests the Treasury Department's Bureau of Alcohol, Tobacco and Firearms (BATF) with power to regulate the alcohol industry.[18] Under this Act, the Treasury Secretary can prescribe labeling regulations to achieve certain goals, including prohibiting consumer deception and ensuring consumer awareness as to product identity and quality.[19] In addition, the Act prohibits inadequate labeling.[20] For many years, warning label advocates argued that a warning label requirement was within the Act's powers.[21] As early as 1977, then Food and Drug Administration Commissioner Donald Kennedy, urged BATF to require alcohol warning labels, stating that warnings were needed to inform consumers about the risks associated with alcohol consumption during pregnancy.[22] Despite initial action to this end, BATF continued to postpone its decision pending further study.[23]

C. State Legislative Efforts

While the battle was brewing at the federal level, similar legislative efforts were attempted in some states. In Califor-

14. S. REP. NO. 333, 99th Cong., 2d Sess. 7 (1986) [hereinafter 1986 REPORT].

15. *Id.* at 13.

16. Cong. Index (CCH) (1986). *See also Alcohol Abuse Hearings, supra* note 5, at 290-91.

17. 27 U.S.C.A. § 201 (West Supp. 1988).

18. *Id.* at § 202. Over the years, criticism has been directed at BATF for allegedly delaying passage of alcohol warning label legislation. Warning label proponents have urged that, rather than BATF, the Department of Health and Human Services should be in control. *Alcohol Abuse Hearings, supra* note 5, at 292.

19. 27 U.S.C.A. § 205(e) (West Supp. 1988).

20. *Id.*

21. *Alcohol Manufacturers' Duty to Warn,* 38 FED. INS. & CORP. COUNS. Q. 247, 254 n.48 (1988) (citing U.S. DEPARTMENT OF THE TREASURY AND U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, 96 CONG., 2D SESS., REPORT TO THE PRESIDENT AND THE CONGRESS ON HEALTH HAZARDS ASSOCIATED WITH ALCOHOL AND METHODS TO INFORM THE GENERAL PUBLIC OF THESE HAZARDS at 5-6.)

22. S. REP. NO. 596, 100th Cong., 2d Sess. at 2 (1988) [hereinafter 1988 REPORT].

23. *Id.*

nia, State Senator Gary Hart introduced a warning label bill in 1986[24] and reintroduced the same bill in 1987.[25] Each time, the bill was defeated by the Senate Health and Human Services Committee without a single vote being cast against it; the majority of the Committee simply chose not to vote.[26] These legislative failures sparked public awareness and outrage. Some citizens blamed the abstentions on fierce industry opposition and the influence of substantial political contributions made by the alcohol lobbies.[27] The alcohol industry's subsequent proposal to conduct an educational campaign designed to alert pregnant women to the dangers of alcohol met with some skepticism.[28]

Throughout the United States, increasing public awareness of the alcohol issue manifested itself in a variety of forms. For example, the Safe Drinking Water and Toxic Enforcement Act, commonly known as Proposition 65, was approved by California voters in 1986 and went into effect on October 1, 1988.[29] Proposition 65 reads, in pertinent part:

> Required warning before exposure to chemicals known to cause cancer or reproductive toxicity: No person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving *clear and reasonable warning* to such individual . . . .[30]

In 1987, a scientific advisory panel appointed by Governor

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24. S. 2291, 1985-86 Leg. Reg. Sess. (1986).

25. S. 96, 1987-88 Leg. Reg. Sess. (1988). *See also* Wolinsky, *Liquor Label Warning Plan Dies at Hearing*, L.A. Times, Mar. 19, 1987, at 3, col. 1.

26. Senate Semifinal History, 1987-88 Leg. Reg. Sess. at 40 (1988). Senate Recess History, 1985-86 Leg. Reg. Sess. at 831 (1986). *See also* Wolinsky, *supra* note 25, at 3, col. 1.

27. *See, e.g.*, Karpati, *Letters to the Times: Warning Labels on Alcohol*, L.A. Times, Mar. 31, 1987, § II at 6, col. 3; Ramirez, *Letters to the Times: Warning Labels on Alcohol*, L.A. Times, Mar. 31, 1987, § II, at 6, col. 1 ("Perhaps I am naive, but I thought that our elected officials were supposed to represent 'we the people.' "); Shultz, *Letters to the Times: Warning Labels on Alcohol*, L.A. Times, Mar. 31, 1987, § II, at 6, col. 5; Rose, *Letters to the Editor: Warning Labels on Alcohol*, L.A. Times, Mar. 31, 1987, § II, at 6, col. 3. *See also* Editorial, *Protecting Babies From Booze*, Sacramento Bee, Mar. 15, 1987, at F4, col.1.

28. *E.g.*, Shultz, *supra* note 27 ("[The alcohol industry representatives] claim that they want to give alcohol producers a chance to conduct their own efforts at public health education. Right. Shall we also eliminate the warnings on cigarettes and ask the tobacco lobby to take over the public education efforts on smoking?").

29. CAL. HEALTH & SAFETY CODE §§ 25249.5-.13 (West 1989) (codification of Proposition 65: Safe Drinking Water and Toxic Enforcement Act of 1986).

30. *Id.* at § 25249.6 (emphasis added).

Deukmejian to help implement Proposition 65 recommended that alcohol be placed on the state's list of chemicals known to cause birth defects.[31] As a result, alcohol became subject to Proposition 65's warning requirement.[32] Debate ensued over what constituted "clear and reasonable warning." Some groups favored warning labels on alcoholic beverage containers, believing them to be the most effective method,[33] but California's Health and Welfare Agency, responsible for implementing Proposition 65, decided in favor of posted warning signs, paid for by the manufacturers.[34] The ten-by-ten inch warning sign,[35] now posted in all of the more than 68,000 licensed alcohol outlets in California[36] which sell or serve alcoholic beverages, reads: "Warning: Drinking distilled spirits, beer, coolers, wine and other alcoholic beverages during pregnancy can cause birth defects."[37] California is one of six states and twelve cities and municipalities that require such warning posters at points of sale.[38]

D. Advent of Potential Civil Liability

While legislative awareness of the warning label issue evolved, there was a parallel movement occurring in the civil justice system. Recent alcohol products liability cases signal a dramatic break with the past.

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31. Capitol Reporters' Transcript of the Safe Drinking Water and Toxic Enforcement Act of 1986: Scientific Advisory Panel Meeting, Aug. 28, 1987, at 124. *See also Panel Wants Alcohol Put on State Health-Risk List,* L.A. Times, Aug. 29, 1987, at 1, col. 1.

32. CAL. ADMIN. CODE tit. 26, § 22-12,000(c)(1) (1988).

33. CONSUMERS UNION OF U.S., INC., AND THE CALIFORNIA COUNCIL ON ALCOHOL POLICY, THE HEALTHY BABIES PETITION (Oct. 1987) [hereinafter CONSUMERS UNION, HEALTHY BABIES PETITION] (an administrative petition submitted to Clifford L. Allenby, Secretary, California Health and Welfare Agency, urging alcohol container labels as the warning method of choice for implementation of Proposition 65).

34. CAL. ADMIN. CODE tit. 26, § 22-12,601(b)(1)(D) - (b)(2) (1988). *See also* Rodriguez, *Key Ruling Due on Effect of Alcohol in Pregnancy,* Sacramento Bee, Aug. 28, 1988, at A3, col. 5.

35. CAL. ADMIN. CODE tit. 26, § 22-12,601(b)(1)(D) (1988).

36. CONSUMERS UNION, HEALTHY BABIES PETITION, *supra* note 33, at 19.

37. CAL. ADMIN. CODE tit. 26, § 22-12,601(b)(4)(E) (1988); *see also* Boyd, *Liquor Warning Signs Spark Controversy,* San Francisco Chron., Nov. 2, 1988, at 4, col. 5.

38. CENTER FOR SCIENCE IN THE PUBLIC INTEREST, FAS WARNING SIGN AND POSTER LAWS FACT SHEET (Mar. 1, 1989). Other states which require warning posters are: Georgia, South Dakota, Maine, Utah, and Nebraska. Cities and municipalities include: New York, N.Y.; Philadelphia, Pa.; Washington, D.C.; Jacksonville, Eustus, Inverness, and Lessburg, Fla.; Oachita Parish, La.; Columbus and Lakewood, Oh.; Normal, Ill.; and Princeton, N.J.

Garrison v. Heublein, Inc. was the first case in which a court granted civil immunity to alcohol manufacturers.[39] In *Garrison,* the Seventh Circuit held that manufacturers do not have a duty to warn of the dangerous propensities of alcoholic beverages. Relying on specific references to alcohol in comments h, i, and j of the Restatement (Second) of Torts, section 402A,[40] the court concluded that alcohol was not an unreasonably dangerous product and that the dangers of alcohol consumption were commonly known.[41] The *Garrison* holding was followed in a series of decisions, most of which also relied on

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39. 673 F.2d 189 (7th Cir. 1982).

40. *See* RESTATEMENT (SECOND) OF TORTS § 402A and comments h, i, and j (1965). Section 402A reads in full:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Comment h to § 402A states:

> Where . . . [a seller] has reason to anticipate that danger may result from a particular use, as where a drug is sold which is safe only in limited doses, [the seller] may be required to give adequate warning of the danger . . . and a product sold without such warning is in a defective condition.

Comment i explains the "unreasonably dangerous" standard:

> Many products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm, if only from over-consumption . . . . The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. *Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey containing a dangerous amount of fusel oil, is unreasonably dangerous.*

(emphasis added).

Comment j discusses product warnings:

> In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning, on the container, as to its use . . . . But a seller is not required to warn with respect to products, or ingredients in them, which are only dangerous, or potentially so, when consumed in excessive quantity, or over a long period of time, when the danger, or potentiality of danger, is generally known and recognized. *Again the dangers of alcoholic beverages are an example* . . . .

(emphasis added).

See also PROSSER & KEETON ON TORTS, ch. 17 § 98, at 657 (5th ed. 1984).

41. *Garrison,* 673 F.2d at 191-92.

the Restatement's language, and resulted in dismissal of complaints.[42] The Restatement's use of alcohol as an example of that which is not "unreasonably dangerous" because its dangers are "generally known and recognized,"[43] proved an unsurmountable hurdle for attorneys relying on strict liability theory. Consequently, alcoholic beverage manufacturers had neither a duty, nor any incentive, to warn of the dangers of excessive or prolonged alcohol consumption. This view prevailed until the recent cases of *Hon v. Stroh Brewery Co.*[44] and *Brune v. Brown Forman Corp.*.[45]

In *Hon,* the United States Court of Appeals for the Third Circuit held that a genuine issue of material fact existed as to whether beer was safe for its intended purpose without a warning, thereby precluding summary judgment under Pennsylvania law.[46] The court held that a brewery may be civilly liable for damage caused by alcohol consumption based on its failure to warn of latent risks not generally understood by consumers.[47] In *Hon,* plaintiff alleged that her twenty-six year old husband's death from pancreatitis resulted from alcohol consumption.[48] Mr. Hon drank two to three cans of beer per night on an average of four nights per week.[49]

After considering the Restatement (Second) of Torts,[50] case law,[51] affidavits submitted by doctors on the effects of alcohol consumption, and advertisements used by the defendant,[52] the court concluded that a jury could find that the general public

42. *See* Desatnik v. Lem Motlow Prop., Inc., No. 82 CV 2207, slip op. (Ohio App. 3d Jan. 9, 1986) (summary judgment against plaintiff; plaintiff's husband, who consumed more than 2500 beers over a six-month period, died of pancreatitis); Pemberton v. American Distilled Spirits Co., 664 S.W.2d 690 (Tenn. 1984) (complaint dismissed; plaintiff's minor son died of acute alcohol poisoning); Russell v. Bishop, No. 88 (Tenn. Ct. App. Jan 7, 1986) (complaint dismissed following *Pemberton*; plaintiff's 17 year old daughter died as passenger in car hit by drunk driver); Maquire v. Pabst Brewing Co., 387 N.W.2d 565, 569-70 (Iowa 1986) (motorist struck vehicle in which plaintiff was riding; Restatement (Second) of Torts § 402A comments j and i used to determine outcome that risk of intoxication was sufficiently known).

43. RESTATEMENT (SECOND) OF TORTS § 402A comment j (1965).

44. 835 F.2d 510 (3d Cir. 1987).

45. 758 S.W.2d 827 (Tex. Civ. App. 1988).

46. 835 F.2d at 514, 517.

47. *See Hon,* 835 F.2d 510.

48. *Id.*

49. *Id.*

50. *Id.* at 515-16.

51. *Id.* at 516.

52. *Id.* at 511, 514-15.

is unaware of the hazard that led to Mr. Hon's death.[53] Noting that in no other case had the plaintiff consumed beer in the exact quantity and manner alleged on the record,[54] the court gave considerable weight to the medical experts' affidavits, which "tend[ed] to show that the general public is unaware that consumption at this level and in this manner can have any serious adverse effects."[55] This subtle distinction opened both the door to future plaintiffs and the eyes of the alcohol industry to the possibility of incurring substantial liability.

Similarly, in *Brune v. Brown Forman Corporation,* a Texas appellate court reversed a summary judgment and sent an alcoholic beverage liability case to the jury.[56] In *Brune,* plaintiff's eighteen year old daughter died from acute alcohol poisoning after drinking straight shots of Pepe Lopez Tequila.[57] On appeal, the court considered whether the risk of death resulting from acute alcohol poisoning was a matter of common knowledge in the community such that the manufacturer had no duty to warn of the danger.[58] After considering the Restatement (Second) of Torts, the court concluded that comments h, i, and j do *not* say that the danger of acute alcohol intoxication resulting in death is generally known and that no warning is required; rather, the comments say only that *when* the danger is common knowledge, no warning is required.[59] The court added: "There is no basis for concluding that alcohol should be treated any differently than any other drug or poison on the market."[60] The court explained its rationale:

> Although there is no question that drinking alcoholic beverages will cause intoxication and possibly even cause illness is a matter of common knowledge, we are not prepared to hold, as a matter of law, that the general public is aware that the consumption of an excessive amount of alcohol can result in death. We realize that there is no clear line between what is and is not common knowledge, but where facts, as shown by appellant's summary judgment proof, show how easily disputed the knowlege of the fatal propensities of alcohol may

53. *Id.* at 517.
54. *Id.*
55. *Id.* at 514.
56. 758 S.W.2d 827, at 831.
57. *Id.* at 828.
58. *Id.*
59. *Id.* at 829.
60. *Id.* at 830.

be, we will not recognize it as common knowledge as a matter of law.[61]

The *Hon* and *Brune* courts' reevaluation of the Restatement (Second) of Torts' comments, and the resulting potential for strict liability recovery for failure to warn, constituted significant breakthroughs and provided additional impetus to the drive for alcohol warning label legislation. "Common knowledge" that alcohol leads to intoxication is no longer being stretched to incorporate the lesser known or understood hazards of alcohol consumption.

The trend toward broader civil liability is also apparent in lawsuits involving Fetal Alcohol Syndrome. Three FAS lawsuits, the first of their kind in the United States, were filed in late 1987 in Washington.[62] In each case, parents are suing liquor distillers and breweries, alleging that their child's birth defects resulted from the mother's alcohol consumption during pregnancy. The parents contend that the alcoholic beverages should have carried warning labels.[63] All were scheduled to go to trial in Spring, 1989.[64]

The Fetal Alcohol Syndrome cases proceed on three theories: negligence, strict liability and products liability.[65] The complaints allege that the defendant alcohol manufacturers "knew or should have known" that ethyl alcohol could cause birth defects in fetuses exposed to it *in utero*, based upon their knowledge that chronic consumption of alcohol caused liver disease, cardiovascular injury, gastrointestinal diseases, addiction, inebriation, and occasional loss of consciousness in

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61. *Id.* at 831.

62. Thorp v. James B. Beam Distilling Co., No. C871527D (W.D. Wash. filed Nov. 5, 1987); Howard v. Potter Distilleries et. al., No. C871525D (W.D. Wash. filed Nov. 5, 1987); Tuttle v. Schlitz Brewing Co. et. al., No. 872023807 (Super. Ct. Thurston County, Wash., filed Dec. 8, 1987) [hereinafter *Complaints*].

63. *Id.*

64. Blum, *Alcohol Marketing Under Attack*, Nat'l L. J., Sept. 5, 1988, at 10, col. 2. After this Note went into publication, one FAS case was decided and the other two were rescheduled for trial next year. *Thorp* was decided on May 17, 1989, by a jury that held in the defendant's favor. Telephone interview with Barry M. Epstein, FAS plaintiff's attorney, of Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross (July 6, 1989). According to Mr. Epstein, these cases are very fact-specific and thus the general verdict should not be looked at as having any precedential value. *Id.* For example, in *Thorp*, evidence was presented that the plaintiff had been warned and knew of the dangers of drinking. *Id.*

65. *Complaints, supra* note 62. *See also* Moss, *Parents Sue Liquor Companies, Cite Lack of Warnings about Fetal Alcohol Syndrome*, A.B.A. J., Mar. 1, 1988, at 17 [hereinafter Moss].

human beings.[66] Further, the complaints allege that the defendants were aware of reports[67] indicating a specific pattern of birth defects in children exposed *in utero* to ethyl alcohol. Although the aim of the suits is compensation for the children and families, Barry M. Epstein, lead counsel for the plaintiffs, said that getting the alcohol companies to use warning labels was a "hoped-for side effect."[68]

E. Growing Body of Data Added Further Impetus

The growing body of literature documenting (1) the harmful effects of alcohol consumption, (2) the lack of public awareness and (3) the economic cost to society from alcohol addiction, accidents and FAS, prompted passage of the Alcoholic Beverage Labeling Act of 1988.

Although for centuries alcohol was suspected of harming fetal development,[69] the relationship between maternal alcohol intake and a characteristic pattern of fetal malformation was not recognized and documented until 1973.[70] A 1978 paper reviewing studies on the effects of alcohol reported: "The fact that a variety of adverse outcomes are being reported at levels of alcohol use that are well within the rubric of 'social drinking' raises concern about the extent of the effects within normal populations of nonalcoholic pregnant women."[71]

Since then, the volume of FAS data has increased. A clinical study has suggested that fetal development can be adversely affected by even moderate drinking during the first few weeks of pregnancy.[72] According to the Center for Sci-

66. *Complaints, supra* note 62.

67. *Id.* (citing Lemoine, Harrousseau & Borteyru, *Les Enfants de Parents Alcooliques. Anomalies Observees. A Propos de 127 cas.*, 21 OUEST MEDICAL, at 476-82, (1968); Jones, Smith, Ulleland & Streissguth, *Pattern of Malformation in Offspring of Chronic Alcoholic Mothers*, I. LANCET, 1267-71 (1973)). For a summary of such studies, *see* Streissguth, *Fetal Alcohol Syndrome: An Epidemiologic Perspective,* 107 AM. J. EPIDEMIOLOGY No. 6, at 467-78 (1978).

68. *See* Epstein Interview, *supra* note 64; Moss, *supra* note 65, at 17.

69. Smith, *The Fetal Alcohol Syndrome,* HOSP. PRAC., Oct. 1979, at 121 ("In the Old Testament . . . an angel admonished Samson's mother: 'Behold, thou shalt conceive, and bear a son; and now drink no wine or strong drink . . . .' ") (A report to the British Parliament in 1834 described offspring of alcoholic mothers as having a "starved, shriveled and imperfect look."). *See also* Streissguth, *supra* note 67, at 467 ("The early Greeks had a prohibition against drinking on the wedding night for fear of begetting a damaged child.").

70. Smith, *The Fetal Alcohol Syndrome, supra* note 69, at 121.

71. Streissguth, *supra* note 67, at 476.

72. Smith, *supra* note 69, at 126-27.

ence in the Public Interest, prenatal exposure to less than one drink per day is linked with preschool attention problems and delayed mental maturity.[73] Even one drink per week may be harmful.[74] A recent study concluded that FAS is the leading cause of birth defects and accompanying mental retardation in North America,[75] ranking above Down's syndrome[76] and spina bifida.[77] It is the only preventable disease of the three.[78]

The Surgeon General, Dr. C. Everett Koop, first warned pregnant women of the risks of alcohol-related birth defects in 1981.[79] His Advisory stated: "The Surgeon General advises women who are pregnant (or considering pregnancy) not to drink alcoholic beverages and to beware of the alcohol content of food and drugs."[80] Recently the warnings have become more emphatic. In July 1988, Dr. Koop issued a report stating: "RECOMMENDATIONS: To reduce the risk for chronic disease, take alcohol only in moderation (no more than two drinks a day), if at all. Avoid drinking any alcohol before or while driving, operating machinery, taking medication, or engaging in any activity requiring judgment. Avoid drinking alcohol while pregnant."[81] In addition, Dr. Koop has stated that alcohol can be addictive and is associated with increased rates of suicide, homicide, liver disease, stroke, high blood pressure, some types of cancer, and decreased family functioning.[82]

FAS is just one of many alcohol-related tragedies evidenced by statistics pointing to an ever-increasing national crisis. For

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73. CENTER FOR SCIENCE IN THE PUBLIC INTEREST (CSPI), THE CASE FOR HEALTH WARNING LABELS ON ALCOHOLIC BEVERAGE CONTAINERS, at 2 (July 1986) [hereinafter CSPI CASE FOR HEALTH].

74. *Id.*

75. Warren & Bast, *Alcohol-Related Birth Defects: An Update*, 103 PUBLIC HEALTH REPORTS 638 (Nov.-Dec. 1985).

76. Down's Syndrome, also called mongolism and trisomy, is "a condition characterized by a small, anteroposteriorly flattened skull, short, flat-bridged nose, epicanthal fold, short phalanges, and widened space between the first and second digits of hands and feet, with moderate to severe mental retardation, and associated with a chromosomal abnormality, usually trisomy of chromosome 21." THE SLOANE-DORLAND ANNOTATED MEDICAL-LEGAL DICTIONARY 691 (1987).

77. Spina bifida is "[a] developmental anomaly characterized by defective closure of the bony encasement of the spinal cord, through which the cord and meninges may (s. bifida cystica) or may not (s. bifida occulta) protrude." *Id.* at 659.

78. Warren & Bast, *supra* note 75, at 638.

79. 11 FED. DRUG ADMIN. DRUG BULL., NO. 12, ADVISORY ON ALCOHOL AND PREGNANCY (1981).

80. *Id.*

81. *Alcohol Abuse Hearings*, *supra* note 5, at 299-300.

82. *Id.* at 300.

example, more than 100,000 lives are claimed in the U.S. by alcohol abuse;[83] highway alcohol-related deaths are the number one killer of fifteen to twenty-four year olds;[84] and alcohol poisoning is second only to carbon monoxide as the leading cause of death from unintentional overpoisoning.[85] According to the Center for Science in the Public Interest, more than $116 billion in health care costs and loss of productivity resulted from the adverse consequences of alcohol abuse in 1983 alone.[86] In 1980, it cost approximately $15 million to treat FAS babies, $670 million to treat nearly 70,000 FAS children under 18, and more than $760 million to treat 160,000 FAS adults.[87] Another study estimates the national cost of caring for 4,777 individuals with FAS afflictions at $110 million annually.[88] In addition, it is well established that alcohol abuse leads to cancer, hypertension and liver disease.[89]

Despite the alcohol industry's argument that the dangers of alcohol consumption are well known, studies indicate a lack of public awareness and common knowledge. A 1985 National Health Interview Survey, conducted by the National Center for Health Statistics, found that only thirty-nine percent of the people polled knew heavy drinking was linked to cancer of the throat, and only thirty-one percent knew it was associated with cancer of the mouth.[90] Further, only forty-eight percent of the respondents thought heavy drinking during pregnancy would definitely increase the risk of birth defects, while thirty-seven percent thought it probably would increase the risk.[91] Only fifty-seven percent of persons under age forty-five had ever heard of FAS.[92] Studies such as these, reflecting consumer misperceptions, added muscle to the push toward warning label legislation.

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83. CSPI CASE FOR HEALTH, *supra* note 73, at 1. *See also* 134 CONG. REC. S2171 (daily ed. Mar. 14, 1988) (statement of Sen. John Glenn).

84. CSPI CASE FOR HEALTH, *supra* note 73, at 1.

85. *Id.*

86. *Id.*

87. Harwood, *Economic Costs to Society of Alcohol, Drug Abuse & Mental Illness: 1980*, RESEARCH TRIANGLE INSTITUTE, at B-11 (June 1984).

88. Abel & Sobel, *supra* note 9, at 63.

89. CSPI CASE FOR HEALTH, *supra* note 73, at 1.

90. NAT'L CENTER FOR HEALTH STATISTICS ADVANCE DATA, HEALTH PROMOTION AND DISEASE PREVENTION PROVISIONAL DATA FROM THE NATIONAL HEALTH INTERVIEW SURVEY, No. 119 at 11 (May 14, 1986) [hereinafter NCHSAD].

91. *Id.* at 12.

92. *Id.*

II.
Critical Examination of the Current Legislation

This analysis consists of four parts. Part one examines the Alcoholic Beverage Labeling Act of 1988. Part two evaluates the Act's major weaknesses and suggests proposals for improvement. Part three discusses the effectiveness of warning labels as a method of informing and protecting consumers. Part four, by analogy to the cigarette industry's experience, illustrates that warning labels may actually benefit the alcohol industry.

A. The Alcoholic Beverage Labeling Act of 1988

The current labeling requirement, ultimately passed by Congress on October 22, 1988, as part of the Anti-Drug Abuse Act of 1988,[93] was first introduced in the Senate on February 4, 1988, by Senator Strom Thurmond.[94] The original bill required rotation of five labels:

"WARNING: The Surgeon General has determined that the consumption of this product, which contains alcohol, during pregnancy can cause mental retardation and other birth defects."

"WARNING: Drinking this product, which contains alcohol, impairs your ability to drive a car or operate machinery."

"WARNING: This product contains alcohol and is particularly hazardous in combination with some drugs."

"WARNING: The consumption of this product, which contains alcohol, can increase the risk of developing hypertension, liver disease, and cancer."

"WARNING: Alcohol is a drug and may be addictive."[95]

The bill was endorsed by more than ninety organizations, including the American Medical Association, the National Parent Teachers Association, and the National Education Association.[96] The Senate Commerce, Science and Transportation Committee unanimously passed the bill on September 20,

93. Anti-Drug Abuse Act of 1988, *supra* note 1.

94. S. 2047, 100th Cong., 2nd. Sess. (1988).

95. *Id.* at 5-6.

96. 134 CONG. REC. S5499-5500 (daily ed. May 12, 1988) (statement of Sen. Thurmond).

1988.[97]

Before passage by the House of Representatives, however, the bill was amended to eliminate rotating warnings.[98] Consequently, section 204(a) of the new law provides that the sole warning shall read: "GOVERNMENT WARNING: (1) According to the Surgeon General, women should not drink alcoholic beverages during pregnancy because of the risk of birth defects. (2) Consumption of alcoholic beverages impairs your ability to drive a car or operate machinery, and may cause health problems."[99]

This warning will be required on all beverages containing not less than one-half of one percent of alcohol by volume.[100] The warnings must appear by November 18, 1989, or a civil penalty of up to $10,000 per day will be imposed. Moreover, each day of delay constitutes a separate offense.[101] In addition, the Act requires that the Treasury Secretary report to Congress in November 1991 on the need for additional warning labels if he or she determines that such a change is warranted by then-existing scientific data.[102]

The current warning label's "may cause health problems" language is controversial. There is concern that the clause is too broad and may serve as blanket immunity from liability for the alcohol industry.[103] The language resulted from "closed-door" sessions between Senate Commerce Committee members and alcohol industry representatives, following the industry representatives' refusal to participate at Committee hearings in August 1988.[104] This lack of public debate throughout the legislation's passage is just one criticism of the Act.

B. Weaknesses and Proposals

The Act has several weaknesses, namely: (1) its preemption clause; (2) its silence as to products liability; (3) its narrow ap-

97. 134 CONG. REC. S3137 (daily ed. Sept. 29, 1988) (statement of Rep. Conyers, D-Mich.).

98. 134 CONG. REC. S.16177 (daily ed. Oct. 14, 1988).

99. Anti-Drug Abuse Act, *supra* note 1, at 4519.

100. *Id.* at 4518.

101. *Id.* at 4520.

102. *Id.*

103. *Liability Issue Looms Large As Alcohol Warnings Become Law*, CORP. CRIME REP., Oct. 31, 1988, at 3 [hereinafter *Liability*].

104. *Id.* at 4.

plication; (4) its lack of rotating labels; and (5) its limited health warning.

1. *Preemption clause*

The preemption clause contained in section 205 states:

> No statement relating to alcoholic beverages and health, other than the statement required by section 204 of this title, shall be required under State law to be placed on any container of an alcoholic beverage, or on any box, carton, or other package, irrespective of the material from which made, that contains such a container.[105]

Accordingly, states cannot require alternative or additional warning labels other than those adopted by Congress, and any changes in labeling must be made by Congress. States *may* implement warning requirements on items other than alcoholic beverage containers, however, such as the warning sign requirement imposed by California's Proposition 65.[106] As long as states do not regulate warnings on alcoholic beverage *containers* they will not be preempted. As Senator Thurmond noted during the debate on the Senate floor, the preemption

> does not in any way prevent the alcohol beverage industry from voluntarily providing further consumer information. Moreover, the preemption should not be construed to indicate that the States do not have the authority in other areas—such as industry advertisements, warning posters, and other educational campaigns—to protect the health and safety of their citizens.[107]

Similarily, Representative John Conyers, Jr. (D-Mich.), the House sponsor of the Alcoholic Beverage Labeling Act of 1988, said in his statement to the House: "Most importantly [the preemption] should not be seen as reflecting any intent to prevent the states from compensating alcohol victims and encouraging the manufacturers to adopt more adequate warnings through traditional product liability litigation and remedies."[108] As Representative Conyers pointed out, the preemption does not preclude state damage actions; rather, it only precludes states from ordering changes in the alcohol warning labels. He urged that the bill be considered only a "federal

105. Anti-Drug Abuse Act, *supra* note 1, at 4520.

106. *See* text accompanying note 30, *supra.*

107. 134 CONG. REC. S16177 (daily ed. Oct. 14, 1988).

108. 134 CONG. REC. Index at 3 (Oct. 17 - Nov. 10, 1988) (statement of Rep. Conyers).

minimum standard."[109]

The federal preemption serves to assure uniformity in warning label requirements. This was an important concession made by Congress to the alcohol industry.[110] Despite the federal preemption, however, states retain the ability to curb alcohol misuse. State-wide legislation, such as California's Proposition 65, rather than city ordinances, could be enacted. In addition, as Senator Thurmond urged, state efforts such as creative educational campaigns, warnings on advertisements, or distribution of informational posters and pamphlets at points of sale would also serve as useful tools to further educate alcohol consumers.[111]

2. *Silence as to Products Liability*

The second weakness in the Alcoholic Beverage Labeling Act of 1988 is its silence on the issue of products liability. The Act lacks the language of the Comprehensive Smokeless Tobacco Health Education Act of 1986, which states that the requisite chewing tobacco warning does not exempt manufacturers from liability.[112] The Smokeless Tobacco Act specifically allows state actions based on inadequate warnings through a "savings clause."[113] In contrast, the current alcohol warning legislation leaves determination of liability to state courts and legislatures. Many opponents of the legislation fear that the broad "may cause health problems" language will effectively provide immunity for alcohol manufacturers just as federally mandated warning labels did for cigarette manufac-

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109. *Id.*

110. 134 CONG. REC. S173001 (daily ed. Oct. 21, 1988) (statement of Sen. Ford, R-Ken.) (After noting that Kentucky produces 90 percent of all domestic bourbon, Senator Ford stated:

> [Section 205] was critical to the success of the negotiations and to my support of it . . . . In an attempt to minimize the burden on what is a legitimiate and responsible industry, the preemption provisions of this act avoid what would otherwise be a multitude of inconsistent statutes, regulations and common law rules. Section 205 makes clear that under this act, the power to regulate the labeling of alcoholic beverage containers in order to forward public health objectives rests exclusively with the Congress.).

111. 134 CONG. REC. S16177 (daily ed. Oct. 14, 1988) (statement of Sen. Thurmond).

112. Comprehensive Smokeless Tobacco Health Education Act of 1986, Pub. L. No. 99-252, § 3, 100 Stat. 30, 30-34 (1986).

113. *Id.* at § 7(c). The clause states: "Nothing in this Act shall relieve any person from liability at common law or under State statutory law to any other person." *Id.*

turers.[114] Therefore, the impact of the alcohol warning measure on the industry's vulnerability in future products liability suits remains a key issue. According to Barry Epstein, FAS plaintiffs' attorney, "The Act will affect future suits [because] people won't be able to sue [on a products liability theory] unless the warning label was inadequate."[115] In addition, says Epstein, the precise meaning of the federal preemption will continue to be litigated.[116]

3. *Narrow Application*

The third weakness is that the warning label requirement covers only alcoholic beverage *containers,* whereas cigarette warnings covered both packages and advertisements. This lack of alternative modes of communicating health messages limits the scope of consumer protection. State and federal governments could work around the container-only federal preemption by requiring warning labels on packages and advertisements. Such measures would ensure wide-spread communication of drinking hazards.

4. *Non-rotating Label*

The Act's fourth weakness is its failure to require a rotating warning label scheme, as a single, non-rotating warning undercuts the potential educational impact possible with varied warnings. By contrast, the cigarette industry is required to provide a rotational system of four different labels.[117] According to Senator Thurmond, the non-rotating label was a

114. The Act's opponents point to the decision in Cipollone v. Liggett Group, Inc., 683 F. Supp. 1487, 789 F.2d 181 (3d Cir. 1986), where the court held liable only the defendant who manufactured the cigarettes that plaintiff smoked *before* imposition of federal warning labels.

115. Telephone interview with Barry M. Epstein, Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross (FAS plaintiff's attorney) (Nov. 1988).

116. *Id.*

117. Comprehensive Smoking Education Act, Pub. L. No. 98-474, § 4, 98 Stat. 220(a) (1984) (codified as amended at 15 U.S.C. § 1333 (1984)). The Cigarette Labeling and Advertising Act has progressed through three warning requirements. The first, imposed in 1965, stated: "Caution: Cigarette Smoking May Be Hazardous to Your Health." Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, § 4, 79 Stat. 282 (1965). This label was replaced in 1970 with: "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health." Public Health Cigarette Smoking Act of 1969, Pub. L. No 91-222, § 2, 84 Stat. 87 (1970). The current quarterly, rotational warnings, adopted in 1984, read:

SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, and May Complicate Pregnancy.

necessary compromise: "My preference is for legislation requiring five rotating warning labels. However, in any successful legislative effort, good faith compromise is a necessary ingredient."[118]

The effect of rotating labels is well documented. In 1981, the Federal Trade Commission issued a study on the effectiveness of cigarette warning labels, recommending a rotating warning system.[119] A report reviewing the study summarized the reasons: "Any single warning is capable of effectively communicating only a limited amount of information; [a] single, more detailed warning might overload consumers with information and have limited effectiveness . . . ; and [a] single, more detailed warning would eventually have the same problem of 'wear out' as the existing warning."[120] The same reasoning should apply to alcohol warning labels.

Rotating warnings would increase the number of health messages reaching consumers and would facilitate prompt communication of such messages as links between drinking and illness emerge. Moreover, it is in the alcohol industry's interest to voluntarily adopt such measures as they would (1) shield the industry from potential liability, and (2) improve the industry's public image.

5. *Inadequate Warning*

The Act's final weakness is that it requires only that the warning labels advise of the dangers of drunk driving and FAS. The warning does *not* address the dangers of alcohol

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SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly Reduces Serious Risks to Your Health.

SURGEON GENERAL'S WARNING: Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, and Low Birth Weight.

SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide.

See also Note, *Judicial and Legislative Control of the Tobacco Industry: Toward a Smoke-Free Society?* 56 U. CIN. L. REV. 317, 326 n. 48 (1987).

118. 134 CONG. REC. S16008 (daily ed. Oct. 14, 1988) (statement of Sen. Thurmond).

119. FED. TRADE COMM'N, STAFF REPORT ON THE CIGARETTE ADVERTISING INVESTIGATION at 21 (1981).

120. DEP'T OF HEALTH & HUMAN SERVICES, REVIEW OF THE RESEARCH LITERATURE ON THE EFFECTS OF HEALTH WARNING LABELS—A REPORT TO THE UNITED STATES CONGRESS at Appendix B(17) (June 1987) [hereinafter HEALTH AND HUMAN SERVICES REPORT].

addiction, mixing alcohol with drugs,[121] and alcohol-related illnesses, such as liver and heart disease, gastrointestinal injuries, and cancers of the stomach, large intestine, pancreas, throat, pharynx, and esophagus.[122]

As previously noted, the non-specific, all-inclusive "and may cause health problems" language of the alcohol warning may serve to protect the alcohol industry from liability. This is unfortunate as it is the consumer, and not the alcohol industry, who requires protection. Gary Rubin, founder of the Council for Law and Education on Alcohol Risks, Inc. (CLEAR), a consumer interest group, suggests that part of the profits from alcohol sales "should go toward solving the health problems they generate."[123] CLEAR advocates that the industry form an industry-supported trust fund to pay for education, research, and treatment programs.[124] This is a sound suggestion. In addition, the industry should initiate extensive educational campaigns, voluntarily adopt additional warnings and include information as to diagnosis and treatment of alcohol-related ailments. Moreover, by so doing, the industry would regain lost public trust.

C. Effectiveness of Warning Labels on Consumers

In 1980, a joint report on the feasibility of alcohol warning labels was issued by the Department of the Treasury and the Department of Health and Human Services.[125] After stating that the public did not sufficiently understand the risks of alcohol consumption,[126] and that a specific health warning label could be effective,[127] the report recommended *against* the use of warning labels for FAS,[128] alcohol-drug interactions,[129] and a system of label rotation.[130] Communications experts urging

121. *See* Note, *supra* note 21, at 256-58, for a discussion on the hazards of mixing alcohol and drugs.

122. *See Liability*, *supra* note 103, at 3.

123. *Gary Rubin and CLEAR*, 7 BULL. ALCOHOL POL'Y No. 1, at 8 (Spring 1988).

124. *Id.*

125. DEP'T OF THE TREASURY & DEP'T OF HEALTH AND HUMAN SERVICES, REPORT TO THE PRESIDENT AND THE CONGRESS ON HEALTH HAZARDS ASSOCIATED WITH ALCOHOL AND METHODS TO INFORM THE GENERAL PUBLIC OF THESE HAZARDS (Nov. 1980) [hereinafter JOINT REPORT].

126. *Id.* at 45.

127. *Id.* at 35-41.

128. *Id.* at 39.

129. *Id.* at 40.

130. *Id.*

this result cautioned the committee that the public was "overwarned" by the government and resented hearing that products they enjoyed posed health risks.[131] The report concluded that it was "premature to recommend health warning labels for alcoholic beverages at this time."[132] According to Catherine Milton, drafter of the section concerning warning labels in the joint report:

> The critical factor in our decision to recommend against warning pregnant women was the lack of hard scientific data concerning the impact of moderate or light drinking. At the time the decision was being made there were no conclusive studies that addressed this issue. For this reason it was felt . . . that it would be more effective to try first some alternate method of warning the public through a joint industry/government public awareness campaign.[133]

In 1986, after monitoring progress of the education campaign effort for five years, Milton wrote:

> It is my opinion that for two reasons a warning label is now advisable: (1) The scientific data on low and moderate drinking is much stronger and conclusive now than it was in 1980; (2) The public awareness campaign is no longer being aggressively pursued by industry or the U.S. government.[134]

In 1987, a U.S. Department of Health and Human Services' report on the potential effects of health warning labels on alcoholic beverages, found that warning labels on products such as cigarettes had been effective in educating the public about risks and modifying consumer habits.[135] The report concluded that:

> (1) Health warning labels can have an impact on the consumer if they present specific, rather than general, information and are clearly written in a manner that can be understood by the target audience; (2) 'Real world' tests of health warning labels, including the saccharin warning label mandated in 1978, show that labels have an impact on con-

131. *Id.* at 35.

132. *Id.* at 41.

133. Letter from Catherine Milton, Director, Public Service Center, Stanford University, to Sen. Gary Hart at 1 (Mar. 28, 1986) (available from the Consumers Union of the USA, Inc., San Francisco, Ca.).

134. *Id.* at 2.

135. HEALTH & HUMAN SERVICES REPORT, *supra* note 120, at 3. *See also* CONSUMERS UNION, HEALTHY BABIES PETITION, *supra* note 33, at 3.

sumer behavior.[136]

A change in consumer behavior was evident when warning labels were imposed on cigarette packages and advertisements. Per capita consumption of cigarettes in the United States began to decline in the early 1970s, a decline that the joint report issued by the Department of the Treasury and the Department of Health and Human Services suggested was "possibly related to the combination of the warning labels on cigarette packages, the disclosure of tar and nicotine levels in ads, major educational efforts and anti-smoking commercials that appeared on television . . . ."[137] Another report concluded that, in combination with other educational activities, labels could be effective in altering consumer behavior.[138]

Thus, by 1988, research had shown that warning labels were effective in educating the public and altering consumer behavior. In addition, seventy-nine percent of those questioned in a 1986 Gallup poll supported federally mandated warning labels on all alcoholic beverage containers.[139] Moreover, a December 1988 report found that sixty-four percent of the public expects labelling and is willing to pay one percent more for their alcoholic beverages in order to support warning labels.[140] Further, more than fifty percent said they would pay five percent more, and forty-three percent said they would pay ten percent more.[141] According to the report, however, the cost of warning labels would be relatively minor.[142]

D. Labels Provide Benefit to the Cigarette Industry

The cigarette industry's experience may foreshadow that of the alcohol industry as the cigarette industry fought a losing battle against warning label legislation twenty-two years ago. Ironically, today the cigarette industry is receiving protection from the very warning label provisions it so vigorously op-

136. CONSUMERS UNION, HEALTHY BABIES PETITION, *supra* note 33, at 9. *See also* HEALTH AND HUMAN SERVICES REPORT, *supra* note 120, at 4.

137. JOINT REPORT, *supra* note 125, at 37.

138. HEALTH AND HUMAN SERVICES REPORT, *supra* note 120, at 3-5.

139. *Public Backs Strong Measures to Fight Alcohol, Drug Abuse*, The Gallup Poll Dec. 18, 1986. *See also Alcohol Abuse Hearings, supra* note 5, at 298.

140. U.S. BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, EXECUTIVE SUMMARY OF FINDINGS OF RESEARCH STUDY OF THE PUBLIC OPINION CONCERNING WARNING LABELS ON CONTAINERS OF ALCOHOLIC BEVERAGES, at App. D (Dec. 1988).

141. *Id.*

142. *Id.* This conclusion was reached after interviewing distilled spirit industry representatives regarding implementation cost. *Id.*

posed. A recent case, *Cipollone v. Liggett Group, Inc.*, demonstrates how mandatory warning labels may shield the tobacco industry from liability.[143]

In *Cipollone,* a manufacturers' liability suit, Rose Cipollone's husband sued three tobacco companies for damages from her 1984 death from lung cancer. The federal district court held liable only the defendant who manufactured the cigarettes that Rose Cipollone smoked *before* imposition of federal warning labels.[144] The *Cipollone* case raises issues relevant to the question of alcohol industry liability. Foremost are those which deal with (1) the industry's duty to warn, (2) the addictive nature of the product, (3) the plaintiff's reliance on industry assurances of product safety, and (4) advertisements which reinforced this view.

The *Cipollone* court, stating that the cigarette industry initially refused to acknowledge health risks associated with the use of its products despite growing medical and scientific evidence, referred to the tobacco industry's action as a "conspiracy" to misrepresent and undermine negative reports:

> The jury . . . may reasonably conclude that 1) defendants negligently failed to conduct research when it was warranted; 2) that they made affirmative health claims which were untrue; 3) that they failed to warn of risks about which they had knowledge; 4) that they deliberately and intentionally refuted, denied, suppressed and misrepresented facts regarding the dangers of smoking; 5) that they withheld knowledge of and failed to market a safer cigarette in order to avoid any admission of liability; and 6) that they engaged in an industry-wide *conspiracy* to accomplish all of the foregoing in callous, wanton, willful and reckless disregard for the health of consumers in an effort to maintain sales and profits.[145]

Thus, the opinion raises issues common to an alcohol product liability scenario and may be a fountainhead for future alcohol cases.

The degree of similarity between the alcohol and cigarette scenarios has provoked diverse commentary. Prior to passage of the current alcohol warning legislation, commentators from within the alcohol industry, recognizing the similarities, urged the industry to adopt warning labels as a measure of

143. Cipollone v. Liggett Group, Inc., 683 F. Supp. 1487 (1987).

144. *Id.* at 1495.

145. *Id.* at 1492 (emphasis added).

enlightened self-interest.[146] The rash of alcohol lawsuits even prompted some stock analysts to advise clients not to invest in the alcohol industry based on the cigarette industry's experience.[147]

III.
Continuing Pressure on the Alcohol Industry

A. Momentum for Stricter Regulation

Passage of the Alcoholic Beverage Labeling Act of 1988 as part of the Anti-Drug Abuse Act marked a substantial victory in a consumer battle spearheaded by Senator Thurmond, the National Council on Alcoholism, the Center for Science in the Public Interest, and more than 100 other organizations.[148] Although this battle has been won, the war continues.

Momentum is building to regulate the alcohol industry further. In December 1988, preliminary recommendations from the Surgeon General's Workshop on Drunk Driving were released.[149] The recommendations include proposals to: (1) severely restrict the tax deductibility of alcohol advertising expenses; (2) establish an "equal time" provision aimed at balancing the number of alcohol advertisements and health messages; (3) fund research to study the effect of alcohol promotion and advertising on under-drinking-age audience members; (4) eliminate all alcohol advertising and promotional activities on college campuses; (5) ban sponsorship, advertis-

146. Fisher, *Wine Makers Divided on How to Fight Curbs,* N.Y. Times, Jan. 1, 1988, at 1, col. 2; Gordon, *Time to Switch, Not Fight,* WINE SPECTATOR, Oct. 31, 1987, at 12: "The same forces for health-consciousness and public disclosure that put tobacco on the road to extinction could also do it to wine, unless the wine industry changes its defensive stance to a friendly, helpful one." *Id.*

147. Cole, *Market Place, Alcohol Lawsuits and Stock Impact,* N.Y. Times, July 26, 1988, at D10, col. 2: "[C]igarette stocks have already been discounted for the litigation problems. They stand at about a 30 percent discount to the market. Anheuser-Busch and other alcohol producers are not yet discounted for litigation worries and thus present a greater downside risk."

148. *Warning Label Bill Passes as Part of Drug Abuse Legislation,* ALCOHOLISM REP., at 4 (Oct. 25, 1988).

149. OFFICE OF THE SURGEON GENERAL, PUBLIC HEALTH SERVICE, DEP'T OF HEALTH & HUMAN SERVICES, PRELIMINARY RECOMMENDATIONS FROM THE SURGEON GENERAL'S WORKSHOP ON DRUNK DRIVING (1988). The final report by the Surgeon General has yet to be released. The preliminary recommendations issued by the Workshop on Drunk Driving, as well as comments they generate, are currently being reviewed by the Surgeon General. Following approval, the report will be forwarded to Congress. [Draft report on file at COMM/ENT office.]

ing, and promotion of public events where a majority of the audience is under legal drinking age; (6) prohibit official alcohol industry sponsorship of athletic events; (7) prevent youth-oriented celebrities from endorsing alcohol products; and (8) require all alcohol advertisements to carry warning information.[150] Similarly, the National Collegiate Athletic Association is considering banning beer advertisements during annual championship tournament broadcasts.[151] As a result, beer, wine, and hard liquor producers, the American Association of Advertisers, the National Association of Broadcasters, and the Association of National Advertisers are lobbying against implementation of the recommendations.[152]

Surgeon General Koop's suggestions call for a drastic overhaul of the alcohol industry's marketing stategy. Such dramatic measures are needed to educate the public about health risks and to dispel common misconceptions conveyed through advertising.

B. The Commercial Speech Implications of Alcohol Advertising

The alcohol industry spends approximately two billion dollars each year marketing its products through advertisements and promotions.[153] In 1987, beer producers spent more than $800 million, liquor marketers more than $250 million, winemakers more than $100 million, and wine cooler marketers more than $100 million in advertising.[154] More than $800 million was spent on television advertising alone.[155] In addition to the tremendous economic impact of the Surgeon General's "equal time" recommendation, the Surgeon General's proposed regulation of alcohol advertising raises first amendment, commercial speech issues.

A seminal Supreme Court commercial speech decision, *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico,*[156] suggests that Congress may have the power to impose

150. *Id.*

151. Youman, *The Ticking Time Bomb of Liquor Regulation,* ADWEEK'S MARKETING WEEK, at 2 (Jan. 2, 1989).

152. Marinucci, *Last Call for Alcohol,* San Francisco Examiner, at D1, col. 4 (Feb. 19, 1989).

153. CENTER FOR SCIENCE IN THE PUBLIC INTEREST, ALCOHOL ADVERTISING FACT SHEET, (Feb. 1989) (on file at COMM/ENT office).

154. *Id.*

155. *Id.*

156. 478 U.S. 328 (1986).

mandatory counteradvertising or to ban alcohol advertisements. In *Posadas,* the Supreme Court upheld a Puerto Rican law banning local advertising of casino gambling. The law was designed to encourage gambling among tourists and to discourage gambling among local citizens.[157] The majority used the four-prong test developed in *Central Hudson Gas & Electric v. Public Service Commission*[158] to determine whether the commercial speech was protected. In upholding the ban, the majority stated that the greater power to ban the activity necessarily implied the lesser power to ban advertising of the activity.[159]

One commentator suggests that the *Posadas* rationale could be extended to subject the alcohol industry to advertising restrictions or bans.[160] The threat of such restrictions could serve to encourage alcohol manufacturers and advertisers to increase their anti-abuse campaigns and public service announcements rather than risk imposition of a complete ban.[161]

If either counteradvertising or a ban is imposed on alcohol advertising, the cigarette industry's experience, once again,

157. *Id.* at 331.

158. *Id.* at 340 (citing Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 566 (1980)). The four-prong test states that if the advertising (i) concerns a lawful activity and is not misleading, then the government may restrict the advertising only if (ii) the government asserts a substantial interest, (iii) the regulation directly advances that interest, and (iv) the regulation is no more extensive than necessary to serve the goverment interest. *Id.*

159. *Posadas*, 478 U.S. at 345-46.

160. Comment, *Alcoholic Beverage Advertising On the Airwaves: Alternatives to a Ban or Counteradvertising,* 34 UCLA L. REV. 1139 (1987). The author, Steve Younger, states that Justice Brennan, in his dissent, seemed to be anticipating the possibility when he reserved judgment as to the constitutionality of restricting "cigarettes, alcoholic beverages, and legalized prostitution" in a footnote. *Id.* at 1167 (quoting *Posadas* at 2985 n. 6). Younger proceeds to apply the majority's analysis of the *Central Hudson* test to a hypothetical ban on alcohol advertising. *Id.* at 1173-77. Younger's summary is as follows: (1) Alcohol advertising is legal and not misleading (*see also* Oklahoma Telecasters Assoc. v. Crisp, 699 F.2d 490 (10th Cir. 1983), *rev'd on other grounds sub nom.*; Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984) (holding that the Supreme Court is concerned with advertising methods that encourage fraud, confusion or overreaching, not glamorizing products); (2) decreasing alcohol abuse is a substantial government interest because of the tremendous number of alcohol-related problems; (3) a ban could directly advance the substantial government interest in reducing such problems; and (4) a legislative determination that the restrictions are no more extensive than necessary will not be questioned. Younger concludes: "[u]nless the Court narrows the *Posadas* holding to its facts and refuses to extend its questionable doctrinal foundation, Congress probably has the constitutional power to ban alcohol advertising from the airwaves or to require counterads." *Id.* at 1177.

161. *Id.* at 1177-78.

provides insight as to possible consequences. In 1968, when the Fairness Doctrine[162] was first applied to cigarette advertisements,[163] mandatory counteradvertising proved extremely successful in reducing cigarette consumption.[164] Consequently, when Congress passed the Public Health Cigarette Smoking Act of 1969,[165] banning cigarette advertisements from radio and television, the decision was supported by the tobacco industry because the effective anti-smoking ads were thereby also banned.[166] Once the controversy was removed from the airwaves, cigarette consumption increased.[167] The Fairness Doctrine was effectively abolished by the Federal Communications Commission in 1987,[168] but if comparable legislation were introduced requiring counter-ads or banning alcohol broadcast advertising, a similar result in alcohol consumption is possible.

Conclusion

Increased legislation at federal and state levels, threats of civil liability, mounting medical and scientific evidence, and enhanced consumer awareness all contributed to passage of the Alcoholic Beverage Labeling Act of 1988.

As it now stands, continued litigation involving the alcohol industry will increase consumer awareness of the adverse

162. The Fairness Doctrine was laid out in its entirety in a 1949 report entitled In re Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949). Under the Doctrine, broadcasters were required: 1) to provide coverage of important, controversial issues of interest in the community which was served by the licensee; and 2) to provide a reasonable opportunity for the airing of contrasting viewpoints on these issues. *Id.* at para. 7.

163. The Fairness Doctrine was first applied to product advertising in *In re Complaint, Directed to Station WCBS-TV*; the Commission ruled that the airing of cigarette commercials raised a controversial issue of public importance. 8 F.C.C.2d 381 (1967), *aff'd sub nom.*, Banzhaf v. FCC, 405 F.2d 1082 (1968), *cert. denied*, 396 U.S. 842 (1969). The Commission reversed its WCBS-TV decision in the 1974 Fairness Report, *In re* Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, 48 F.C.C.2d 1, paras. 67-70 (1974).

164. Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582, 589 n. 18, citing U. S. Department of Agriculture, *Tobacco Situation*, Sept. 1971, at 5 (D.D.C. 1971) (Wright, J., dissenting), *aff'd sub nom.*, Capital Broadcast Co. v. Kliendienst, 405 U.S. 1000 (1972).

165. 15 U.S.C. §§ 1331-40 (1982).

166. *Capital Broadcasting Co.*, 333 F. Supp. at 589.

167. *Id.*

168. Syracuse Peace Council v. Television Station WTVH, 2 F.C.C. Rcd. 5043 (1987), *aff'd sub nom.*, Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989). *See also* Note, *Alternatives to the Fairness Doctrine: Structural Limits Should Replace Content Controls*, 11 HAST. COMM/ENT L.J. 291 (1989).

health effects of alcohol consumption. As the body of scientific and medical evidence increases, the industry will be forced to keep its warnings current. Passage of the Alcoholic Beverage Labeling Act of 1988, coupled with state legislation like California's Proposition 65, will continue to have significant impact on public awareness and education. In addition, potential advertising bans or restrictions threaten the alcohol industry with further regulation and thus provide continuing impetus for the industry to voluntarily inform the public of alcohol hazards.

Passage of the Act signals a changing climate of increasing consumer power and decreasing industry immunity. As litigation and legislation raise public awareness of the dangers of alcohol consumption, industry credibility will continue to fall. To counter this, the industry must change its position by learning from the cigarette industry's experience. Rather than take the defensive, the alcohol industry should face the issues squarely, adopt a positive strategy recognizing the legitimate health concerns associated with abuse of its product, and begin to propose creative solutions to the problem. As Jim Gordon, managing editor of *The Wine Spectator,* said in a 1987 editorial, "Winemakers can pull the train of health consciousness or they can be dragged along behind it as the cigarette makers were."[169]

169. Gordon, *supra* note 146.